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J.D. Lever PL 1

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-190448

DATE: April 6, 1978

MATTER OF: Verne Corporation

DIGEST:

Step Two IFB required entry of base price without Federal excise tax (FET), the FET and total bid price including FET. Bidder entered amount approximating only, 1/100th of applicable FET. Agency rejection of bid--despite bidder's claim that total bid price was correct and FET had mistakenly been included in base price without FET column--was reasonable where \$10.95 FET entry could reasonably be interpreted as intended to be \$1,095 (unit bid price was \$12,284.40) and where there is no indication that agency afforded bidders unequal treatment.

Verne Corporation (Verne) has protested the Department of the Army, United States Army Tank-Automotive Material Readiness Command's rejection of its bid and the award of contract No. DAAEO7-77-B-3968 to Southwest Truck Body Company (Southwest).

The Army issued the subject two-step solicitation for the small business set-aside purchase of 904 flatbed trailers and related documentation and equipment. The trailers were divided into three groups. Item No. 0001 called for 181 trailers and item No. 0002 called for 721 trailers. Item Nos. 0001 and 0002 were essentially the same item. Item No. 0006 called for two trailers. Item No. 0006 trailers were similar to item Nos. 0001 and 0002 trailers except that a more expensive braking system was required. The Government also had an option to purchase up to 50 percent additional trailers.

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Five proposals were submitted in response to Step One and were determined to be technically acceptable and eligible to participate in Step Two, the invitation for bids. The bid schedules for item Nos. 0001 and 0002 required a bidder to enter a base price without Federal excise tax (FET), the applicable FET, and the total bid price including FET. All bids were required to include FET and bids were to be evaluated on the total bid price including FET. The bid schedule for item No. 0006 did not provide for a breakdown of the bid price, but clearly indicated that a bid on items No. 0006 included FET.

The bids of the five bidders on items No. 0001 and No. 0002 trailers were as follows:

Bidder	Base Vehicle Price	Federal Excise Tax (FET)	Total Vehicle Price
1 Verne	\$12,273.45	\$ 10.95	\$12,284.40
2 Southwest	11,347.00	1,005.00	12,352.00
3 Miller Trailers	11,541.92	953.08	12,495.00
4 Theurer Greenville	11,885.00	1,098.00	12,983.00
5 Warrenville Trailer	14,869.42	1,486.86	16,355.28

Upon review of the bids, the Army suspected that Verne had made a mistake in bid with respect to the applicable FET and requested that Verne review its bid and verify the amount of the intended FET. (The general FET for this item is 10 percent.) Verne notified the Army that its total bid price was correct. Verne, however, stated that the breakdown of the bid prices for item Nos. 0001 and 0002 was incorrect and that the correct breakdown was as follows:

Unit Price	FET	Total
\$11,167.64	\$1,116.76	\$12,284.40

Verne explained the "mistake" on the grounds that, in preparing worksheets, it had failed to include the cost of the FET for the spare tire required for each trailer.

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Verne further stated that when entering the price of item Nos. 0001 and 0002 on the bid schedule it entered its original total price including FET as the unit price without FET and entered \$10.95, the spare tire FET as the total FET.

The contracting officer (CO), by letter, requested that Verne furnish the Army with Verne's original worksheets and any other evidence which would establish that the bid as submitted was as originally intended. The letter also stated that a preaward survey indicated that Verne was deficient in various areas and that the Army was prepared to find Verne nonresponsive in the event the "mistake" in Verne's bid was resolved. Additionally, the letter indicated that Verne's bid was nonresponsive for failure to include shipping weight information required for bid evaluation.

During his visit to Verne's plant, the CO orally requested to see Verne's worksheets and was provided with summary sheets, which were used in transferring Verne's bid to the bid schedule. Verne, however, upon the advice of counsel refused at that time to supply backup data in support of the summary sheets. The CO then advised Verne that failure to produce complete worksheets at that time might reasonably be interpreted to mean that in fact no worksheets existed.

Verne responded to the CO's letter in regard to the alleged nonresponsibility and also submitted worksheets. Verne also supplied the Army with a copy of a contemporaneous supplier quote on the tires it intended to use reflecting that the FET on each tire was \$10.95. The CO notified Verne that, after consideration of the evidence, he had concluded that the error in Verne's bid was so clear that acceptance would be unfair to other bidders, and, therefore, the bid was being rejected pursuant to Armed Services Procurement Regulation (ASPR) § 2-406.3 (e)(2) (1976 ed.). Verne subsequently made a timely protest to the Army and after denial of that protest by the Army filed a protest with our Office.

The Army maintains that the error in Verne's bid was so obvious that it would have been prejudicial to other bona fide bidders to accept Verne's bid. The

Army asserts that Verne did not present clear and convincing evidence that the bid as submitted was as originally intended. The Army believes, therefore, that rejection of Verne's bid was proper under ASPR § 2-406.3(e)(2). The Army relies on the fact that when it requested Verne to furnish back-up data to the summary sheets, Verne refused to furnish such documentation until 4 days after the request. The Army states that Verne's failure to promptly provide the back-up data weighed heavily in the decision to reject Verne's bid.

The CO also states that Verne's worksheets were suspect in several areas. In particular, the CO notes that Verne proposes a total of only 26.5 minutes of quality control per unit, while the Government estimates 15 hours per unit; (2) the cost for materials such as steel, wood and paint appears to be low; and (3) Verne proposes that 255 man-hours of production control would be required, whereas the Government estimates that a minimum of 2,000 hours is needed. The CO also asserts that Verne's explanation of how the \$10.95 FET amount was entered on the bid schedule must ultimately fail because Verne's worksheets reflect that the FET on the spare tire was already included in Verne's base vehicle price.

The resolution of the subject protest is dependent upon whether it was clear that Verne's bid as submitted included the applicable FET and whether to accept Verne's bid which did not contain an amount even closely approximating the applicable FET would have been prejudicial to the other bidders.

The Army has consistently taken the position that Verne's total bid price was in error and that Verne's FET entry of \$10.95 was a clerical mistake with the intended FET price actually being \$1,095. Under this interpretation Verne's bid would have been \$13,368.45 and would not be the low bid.

At the outset we note that the solicitation did not require a bidder to enter the exact amount of the FET. Section D-5 of Step Two merely required bid prices to include applicable taxes and duties. Bids stated to be exclusive of such taxes and duties would be rejected as nonresponsive. While we recognize that an argument

could be made that the bid schedules for item Nos. 0001 and 0002 were designed so as to require a bidder to enter the exact amount of the FET, we do not believe that such an argument is persuasive. Here the Army did not have the option to evaluate bids on a "without FET"--"with FET" basis but rather could only evaluate bids on a "with FET" basis. Therefore, the controlling question is whether a bid included the applicable FET. Even if the Army had the option of evaluating bids on a "without FET" basis, we do not believe that a bid could be summarily rejected for entering an amount less than the full applicable FET. In such a situation a bidder would be obligated to pay the applicable tax although his bid might not be passing the cost of the tax on to the Government. Cf. B-173487(1), December 10, 1971. Any loss incurred by failing to bid the full applicable FET would be borne by the contractor and not the Government.

We also recognize a strong argument can be made that the evidence submitted by Verne clearly indicates that Verne's total unit prices for item Nos. 0001 and 0002 included applicable FET and should not have been rejected on the basis of a suspected mistake. Examination of Verne's worksheets does lend support to the position that Verne's bid included an appropriate amount for the FET. The pertinent portion of Verne's summary sheets dated 3 days before bid opening was as follows:

"Total price	Unit	11,157.68
F.E.T.	Unit	1,115.77
Total price w/F.E.T.	Unit	12,273.45
Spare Tire F.E.T.		10.95
Total price per unit		12,284.00"

It is easy to see how Verne could have entered the total unit price with FET as the unit price without FET and the spare tire FET as the FET per unit. Additionally, a copy of a contemporaneous supplier quote on the tires proposed to be used by Verne reveals that the FET on such tires was \$10.95.

Furthermore, adopting the Army's position that Verne actually intended to include \$1,095 as FET and its bid to be \$13,368.45 per unit for item Nos. 0001 and 0002 would mean that Verne intended to bid more for such items than for the more expensive item No. 0006. As noted earlier, item No. 0006 was essentially the same as items No. 0001 and No. 0002 but was to be outfitted with a more expensive braking system. Verne's bid for item No. 0006 was \$12,484.40 including FET, \$884.08 less than Verne's bid for items No. 0001 and No. 0002 under the Army's interpretation. To hold that Verne intended to bid more for a less expensive item than for a more expensive item would appear to be illogical.

In view of the closeness of the competition, however, we do not believe that the Army acted unreasonably in rejecting Verne's bid on the basis of a suspected mistake. The Army's interpretation of Verne's FET entry of \$10.95 as a clerical mistake intended to be \$1,095 was reasonable since the FET on the base price entered on the bid schedule for items No. 0001 and No. 0002 would be in the \$1,000 range. Furthermore, as the Army points out, some doubt is cast upon Verne's explanation of its "mistake" since Verne's backup data indicate that it had figured the price of the spare tire in the base price without FET. Accordingly, when the FET was figured on the base vehicle price it included the FET for the spare tire. While this fact does not necessarily preclude Verne's explanation (Verne could have mistakenly thought it had failed to include the spare tire FET when preparing the summary sheets and then made a mistake in transferring the price to the bid schedule), we believe that reliance on this interpretation was not unreasonable.

We believe the case of McCarty Corporation v. United States, 499 F.2d 633 (Ct. Cl. 1974), deserves discussion. In McCarty, which involved the same facts addressed in our decision in B-172900, December 21, 1971, the Court of Claims held that the Government acted arbitrarily and capriciously in allowing a second low bidder to correct its bid and not the original low bidder where both bids contained mistakes and where award was to be made on the basis of total price. The solicitation in McCarty was for three items but award was to be made on the basis of the total bid for the three items. The two low bids were as follows:

The McCarty Corporation	Item No. 1	\$140,000
	Item No. 2	143,000
	Item No. 3	<u>100,000</u>
	Total	\$674,000

Morris Plumbing Co., Inc.	Item No. 1	\$155,000
	Item No. 2	389,000
	Item No. 3	<u>137,000</u>
	Total	\$690,000

Upon review of the bids the Government determined that both bids contained errors and administratively corrected them. The Government took the position that both Morris Plumbing Co., Inc. (Morris), and McCarty Corporation (McCarty) had made arithmetic mistakes and that Morris' actual bid totalled \$681,000 and McCarty's bid was \$683,000. The Government then refused to allow McCarty to correct its mistake since correcting McCarty's mistake would displace Morris' bid and the nature of the mistake and the intended bid were not evident from the face of McCarty's bid. McCarty maintained that its total bid price was correct and that the price for item No. 2 was intended to be \$434,000. McCarty explained its mistake on the grounds that, when entering a price of \$434,000, it transposed the figure and entered \$443,000.

Our Office stated that:

"We appreciate the basis upon which McCarty's request for correction was denied and do not believe that the contracting officer acted unreasonably in the circumstances. However, we believe it to be the better view that McCarty's intended bid was apparent on the face of bidding documents submitted without necessity for resort to extraneous evidence.

* * * * *

"In view of the invitation advice that award was to be made only on a total bid price, or aggregate, basis, there would have been no logical reason for McCarty to quote a schedule total price lower than the sum of its item prices, as might be the case where award could

be made either in the aggregate or on an item basis. Since the McCarty total was in error, it appeared at first blush, that a mistake had occurred either in the total itself or in the items making up the total. However, upon closer analysis of the figures involved, the possibility of the total itself having been in error is so remote as to make it unreasonable, in our view, to use such possibility as a basis for resolving the issue involved. We think, under the circumstances of this case, where the total bid has been verified by the bidder as correct and there could be no purpose served by deliberate understatement of the correct total, that the probability of the error having occurred as a transposition of \$443,000 for the intended \$434,000 is sufficiently great to support with nothing more a conclusion that the error was, in fact, so made."

We concluded that award should have been made to McCarty but stated that termination of the contract awarded to Morris would not be in the best interest of the Government since the work under the contract had progressed to a considerable degree and the Government could not be said to have acted unreasonably in the first instance.

The Court of Claims, however, determined that the Government had acted arbitrarily and capriciously in failing to allow McCarty to correct its mistake. The court held that neither mistake was apparent from the face of the bid, that the mistake in Morris' bid was not a clerical one which could be corrected administratively and that correction of Morris' bid would displace McCarty's low bid.

The court's decision in McCarty was based on the fact that McCarty's bid total before correction was lower than Morris' and award was to be made on the basis of total bid price. Although McCarty and the subject protest are similar--in both instances the low bidder claimed that the total bid was correct and award was to be made on the basis of total bid price--we believe McCarty is distinguishable. First, in McCarty the Government allowed the second low bidder to correct its bid but did not allow

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McCarty to correct a mistake. This unequal treatment combined with an unauthorized administrative correction was determined by the court to be arbitrary and capricious. Second, reliance on McCarty's total bid price was justified since the transposition explanation was undeniably reasonable.

In the instant case, however, there is no indication that Government treatment afforded Verne differed substantially from its treatment of other bidders. Additionally, interpretation of Verne's FET entry of \$10.95 as a clerical mistake and its intended FET as \$1,095 was reasonable since the FET entry was 1/100th of the approximate FET. The Army's lack of confidence in Verne's total price, unlike in McCarty, was reasonable under the circumstances.

We wish to stress, however, that the rejection of a bid on the basis of a suspected mistake where the bidder consistently asserts that no mistake was made is a serious matter which our Office will closely scrutinize. In the present case there was evidence that Verne's bid did in fact contain an amount attributable to FET approximating the applicable FET. However, we do not find that the Army acted unreasonably in rejecting Verne's bid.

Accordingly, the protest is denied.

Acting


Comptroller General
of the United States